ATTORNEY FOR APPELLANT:

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IN THE
COURT OF APPEALS OF INDIANA

COMMISSIONER OF LABOR, on the RELATION of LEMELANY S. MURPHY,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 49A02-0805-CV-416
SHREE JI BAVA, LLC, JOHN DOE, and RICHARD ROE,	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn L. Moberly, Judge
Cause No. 49D12-0711-PL-47795

July 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

The Commissioner of Labor ("the Commissioner") on behalf of Lemelany Murphy appeals the amount of attorney fees awarded by the trial court in a wage payment action. We reverse and remand.

Issue

The Commissioner raises one issue, which we restate as whether the trial court properly reduced the award of attorney fees.

Facts

On November 7, 2007, the Commissioner filed a complaint against Shree Ji Bava, LLC, ("SJB") alleging that Murphy was not timely paid by SJB. SJB did not respond, and on December 13, 2007, the Commissioner moved for default judgment requesting damages in the amount of $750.00 and requesting attorney fees in the amount of $2,164.50. On January 9, 2008, the trial court entered default judgment in the amount of $750.00 and awarded attorney fees in the amount of $1,000.00. On February 7, 2008, the Commissioner filed a motion to correct error alleging that the trial court improperly calculated attorney fees. On February 11, 2008, the trial court denied the Commissioner's motion to correct error. The Commissioner now appeals.

Analysis

We first note that SBJ did not file an appellee's brief. Under such circumstances, we need not undertake the appellee's burden of responding to arguments that are advanced for reversal by the appellant. Griffin v. Griffin, 872 N.E.2d 653, 656 (Ind. Ct. App. 2007). Instead, we may reverse the trial court if the appellant makes a prima facie

case of error. Id. "Prima facie" is described as at first sight, on first appearance, or on the face of it. Id.

The Commissioner appeals the trial court's denial of his motion to correct error. "We generally review a trial court's denial of a motion to correct error for an abuse of discretion." Munster v. Groce, 829 N.E.2d 52, 57 (Ind. Ct. App. 2005).

The Commissioner sought attorney fees pursuant to Indiana Code Section 22-2-5-2, which provides in part that when an employer fails to properly pay wages to an employee, "the court shall tax and assess as costs in said case a reasonable fee for the plaintiff's attorney or attorneys." In support of his request for attorney fees, the Commissioner included an affidavit from his attorney regarding the accrual of fees and a summary of charges. According to the affidavit, the attorney will have generated a fee of $2,164.50 in prosecuting this action. The trial court only awarded the Commissioner $1,000.00 in attorney fees. In the absence of any evidence or argument to the contrary either before the trial court or on appeal that the fee amount is unreasonable, the Commissioner has made a prima facie showing that the trial court abused its discretion in denying his motion to correct error.[1]

However, our holding is limited to the fees actually accrued by the Commissioner. According to his evidence, two hours of the fee was based on the anticipation of enforcing the judgment. Because those fees have not yet accrued, the Commissioner has

[1] Because there is evidence supporting the Commissioner's attorney fee request, we believe a hearing on the amount of trial attorney fees is unnecessary.

not made a prima facie showing that he is entitled to that $390. Instead, he is entitled to the $1,774.50 in attorney fees that have actually accrued.

The Commissioner also seeks appellate attorney fees. In St. Vincent Hospital and Health Care Center, Inc. v. Steele, 766 N.E.2d 699, 706 (Ind. 2002), our supreme court concluded that reasonable appellate attorney fees are included in the attorney fees provision of Indiana Code Section 22-2-5-2. The Commissioner has made a prima facie showing that he is entitled to reasonable attorney fees incurred in the prosecution of this appeal. We remand for the determination of reasonable appellate attorney fees.

Conclusion

The Commissioner has made a showing of prima facie showing that he is entitled to $1,774.50 in attorney fees and appellate attorney fees. We reverse and remand.

Reversed and remanded.

CRONE, J., concurs.

BRADFORD, J., dissents with separate opinion.

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BRADFORD, Judge, dissenting.

Because I believe that the Commissioner has failed to establish that the award of $1000.00 in attorneys' fees constituted an abuse of discretion, I must respectfully dissent from the portion of the majority's disposition awarding the Commissioner $2164.50 in attorneys' fees. My conclusion is based on my belief that the majority has applied the *prima facie* error doctrine in an overbroad fashion. As the majority mentions, SJB did not file an appellee's brief. Where the appellee fails to file a brief on appeal, it is within our discretion to reverse the trial court if the appellant makes a *prima facie* showing of reversible error. *Phegley v. Phegley*, 629 N.E.2d 280, 282 (Ind. Ct. App. 1994), *trans. denied*. "*Prima facie* error is error at first sight, at first appearance, or on the face of it."

Valley Federal Sav. Bank v. Anderson, 612 N.E.2d 1099, 1101 (Ind. Ct. App. 1993). "This rule is not for the benefit of the appellant." *Phegley*, 629 N.E.2d at 282. "It was established for the protection of the court so that the court might be relieved of the burden of controverting the arguments advanced for a reversal where such a burden rests with the appellee." *Id*.

The *prima facie* error rule, however, does not mean that the appellant automatically wins if the appellee fails to file a brief or that we must accept all of appellant's assertions without question. Refusal to formulate an appellee's argument and blind acceptance of an appellant's are not the same thing. Regardless of appellee's lack of response, either the appellant has made his case or he has not, and here he has not.

"An award of attorneys' fees will be reversed only for an abuse of discretion." *Valadez v. R.T. Enterprises, Inc.*, 647 N.E.2d 331, 333 (Ind. Ct. App. 1995) (citing *Posey v. Lafayette Bank and Trust Co.*, 583 N.E.2d 149, 152, (Ind. Ct. App. 1991)). "An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law." *Id*. (citing *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993)).

The Commissioner's argument consists entirely of his noting that the affidavit before the trial court listing $2164.50 in attorneys' fees was the only evidence submitted on the question. I cannot accept the proposition that, simply because the amount of attorneys' fees is undisputed, it follows that they are necessarily reasonable. If the legislature had intended victorious litigants under Indiana Code section 22-2-5-1 to recover *actual* attorneys' fees in all cases, then that is precisely what it would have said.

The legislature, however, said *reasonable* fees, which, in my view, allows for the exercise of discretion and also means that some fees are *un*reasonable. There are undoubtedly cases where the actual attorneys' fees would be reasonable, but the Commissioner has not explained to my satisfaction why this case falls into that class. In other words, the Commissioner has not established that the trial court either misapplied the law or that its decision was against the logic and effect of the facts and circumstances before it.[2] *See Valadez*, 647 N.E.2d at 333 (concluding that award of $1500.00 in attorneys' fees where $7285.20 was requested was not an abuse of discretion). In all other respects, I concur with the majority's disposition.

[2] We may only speculate regarding the trial court's reasons for awarding only $1000.00 in attorneys' fees, but perhaps it concluded that a fee award of nearly three times the amount of actual damages was unreasonable.